IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DANIEL GARDNER, Plaintiff/Appellee, v. STUDIO 6, a corporation, d/b/a ACCOR NORTH AMERICA, INC., a Delaware corporation, Defendant/Appellant.	2 CA-CV 2008-0010 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20072383

Honorable John F. Kelly, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Appellant Studio 6 appeals from the trial court's denial of its motion to set aside the default judgment entered against it in favor of appellee Daniel Gardner in his personal injury action. Studio 6 contends the judgment is void for lack of personal jurisdiction because the service of process upon it was ineffective. It also argues that "good cause exists and justice requires that the Default Judgment . . . be vacated." Finding no error, we affirm.

Factual and Procedural Background

¶2 The relevant facts are undisputed. On May 2, 2007, Gardner filed a complaint against Studio 6, a hotel chain, alleging that, while he was staying at one of its hotels in Tucson, Studio 6 had negligently allowed water to accumulate on the sidewalk near his hotel room. Garnder further alleged that, because of Studio 6's negligence, he had slipped and fallen on the sidewalk, sustaining serious, permanent injuries. Gardner sought damages for the resulting medical expenses he had incurred, future medical expenses, ongoing "severe pain, discomfort and emotional distress," and lost income.

¶3 On May 11, 2007, Gardner served Studio 6 by having a process server hand-deliver a copy of his summons and complaint to Tammie Aussie, the general manager of the Studio 6 hotel in Tucson where he had fallen. Studio 6 did not file a timely answer to the complaint, and, on June 1, 2006, Gardner filed an application for entry of default against

Studio 6.[1] Gardner mailed a copy of his application for entry of default to the Studio 6 hotel in Tucson where Aussie had been served. On June 6, 2007, Aussie sent a copy of the complaint and the application for default by facsimile (fax) to Studio 6's home office. About a week later, a Studio 6 representative called Gardner's attorney's office, inquiring only if Gardner had been a guest at the hotel. Studio 6 filed nothing opposing Gardner's application for entry of default.

¶4 Studio 6 did not attend the June 18, 2007, hearing at which the trial court entered judgment in favor of Gardner for $350,000. Over a month later, Studio 6 moved to vacate the default judgment pursuant to Rules 55(c) and 60(c), Ariz. R. Civ. P. Studio 6 argued the judgment should be vacated "due to ineffective service of process" because, as Aussie had told Gardner's process server, Aussie was not authorized to accept service for Studio 6. *See* Ariz. R. Civ. P. 60(c)(4) (party may seek relief from void judgment). Studio 6 also asserted the judgment should be vacated due to surprise or excusable neglect, pursuant to Rule 60(c)(1), or "good cause," pursuant to Rule 55(c).

[1]Pursuant to Rule 55(a), Ariz. R. Civ. P., a default becomes effective ten days after the application for its entry is filed, unless the party claimed to be in default files a response before the ten days have passed. Gardner's application stated the same.

¶5 At a hearing on Studio 6's motion to vacate the default judgment,[2] both Aussie and Gardner's process server testified that Aussie had, in fact, told the process server she was not authorized to accept service on behalf of Studio 6. Aussie nonetheless testified that she was the hotel manager and had introduced herself as such to the process server. She testified further that, as the manager, she was authorized to hire and fire hourly employees with approval from the corporate office in Dallas, "overs[aw] the general operation of the hotel," could spend $75 per day for the hotel's operation without prior approval, and could evict disruptive guests. But, Aussie testified, she could not enter into service contracts or hire or fire salaried employees on behalf of Studio 6. She also testified that she had daily contact with her supervisor, who was located in Dallas.

¶6 The trial court found the "[s]ervice of process upon Aussie was effective as to [Studio 6]" despite Aussie's statement that she was not authorized to receive it because Aussie was a "managing or general agent" of Studio 6 and "subject to service within the meaning of Rule 4.1(k)[, Ariz. R. Civ. P.]." The court additionally found Studio 6 was not entitled to relief due to surprise or excusable neglect because one of its claims representatives

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[2]Studio 6 has failed to provide this court with a certified transcript of this hearing as required by Rule 11(b), Ariz. R. Civ. App. P. Although both Studio 6 and Gardner have attached to their appellate briefs what are purportedly partial transcripts of the proceedings, this method of creating the record on appeal does not comply with our rules. *See In Re Prop. at 6757 S. Burcham Ave.*, 204 Ariz. 401, ¶ 11, 64 P.3d 843, 846-47 (App. 2003). However, because neither party asserts the attached transcripts are inaccurate or disputes the facts, we will consider the transcripts. *Cf. Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, ¶ 2, 129 P.3d 487, 488 (App. 2006) (accepting undisputed facts as true despite lack of trial transcripts).

had admitted having received a fax of the complaint and application for entry of default nearly two weeks before the default hearing, and because Studio 6 had not "acted as a reasonably prudent person" to prevent entry of the default judgment. Accordingly, the court denied Studio 6's motion. This appeal followed.

Discussion

Personal Jurisdiction

¶7 Studio 6 first argues the trial court lacked personal jurisdiction over it because the service of process on its employee, Aussie, was insufficient. Thus, it contends, the trial court erred by denying its motion to set aside the judgment. *See* Ariz. R. Civ. P. 55(c) (court may set aside default judgment "in accordance with Rule 60(c)"); Ariz. R. Civ. P. 60(c)(4) (party may seek relief from void judgment). "Proper service of process is essential for the court to have jurisdiction over the defendant." *Koven v. Saberdyne Sys., Inc.*, 128 Ariz. 318, 321, 625 P.2d 907, 910 (App. 1980). "Consequently, a judgment would be void and subject to attack if the court that rendered it was without jurisdiction because of lack of proper service." *Id.; see also Kadota v. Hosogai*, 125 Ariz. 131, 134, 608 P.2d 68, 71 (App. 1980) ("[T]he law is clear that a judgment is void if the trial court did not have jurisdiction because of a lack of proper service."); Ariz. R. Civ. P. 60(c)(4). Although we review a trial court's ruling on a motion to set aside a default judgment for an abuse of discretion, *see Cockerham v. Zikratch*, 127 Ariz. 230, 233, 619 P.2d 739, 742 (1980), whether the court has personal jurisdiction over a party is a question of law that we review de novo, *see Bohreer v. Erie Ins.*

Exch., 216 Ariz. 208, ¶ 7, 165 P.3d 186, 189 (App. 2007). And, "[i]f a[] . . . judgment is void for lack of jurisdiction, the court has no discretion, but must vacate the judgment." *Springfield Credit Union v. Johnson*, 123 Ariz. 319, 323 n.5, 599 P.2d 772, 776 n.5 (1979).

¶8 Pursuant to Rule 4.1(k), Ariz. R. Civ. P., service of process on a corporation "shall be effected by delivering a copy of the summons and of the pleading to a partner, an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." The trial court determined service of process had been effective because Aussie was a "'managing or general agent'" subject to service of process on behalf of Studio 6.[3] Studio 6 argues the court's finding was erroneous because Aussie did not have "ostensible or apparent authority" to accept service on behalf of Studio 6.

¶9 Apparent agency principles are relevant only when the question is whether the person served falls under the catch-all provision of Rule 4.1(k), which provides that service is proper if made upon "any other agent authorized by . . . law to receive service of process." *See, e.g., Koven*, 128 Ariz. at 322, 625 P.2d at 911 ("[T]he phrase agent authorized by law to receive service of process is sufficiently broad . . . to permit service through an ostensible agent."). Apparent agency principles are not relevant, however, when the person served is

[3]Studio 6 also argues the default judgment is void because the affidavit of service of process stated Aussie had told the process server she was authorized to accept service when, indeed, both Aussie and the process server testified Aussie had told the process server she was not authorized to accept service. Studio 6, however, cites no authority—and we find none—suggesting an affidavit of service erroneous in one aspect renders void a default judgment if service was otherwise effective.

an employee of the corporation and the question before us is whether that person is a "managing or general agent" of the corporation. We find no authority applying apparent agency principles where the individual served was an employee of the corporate entity. *See, e.g., id*. at 322, 625 P.2d at 911 (applying apparent agency principles when individual served was former officer of corporation).

¶10 Resolution of whether Aussie was a managing or general agent of Studio 6 is instead determined by her role and responsibilities within the defendant corporation—whether she "'is of such character and rank so that it is reasonably certain the defendant will receive actual notice of the service of process.'" *Safeway Stores, Inc. v. Ramirez*, 1 Ariz. App. 117, 119, 400 P.2d 125, 127 (1965), *quoting Schering Corp. v. Cotlow*, 94 Ariz. 365, 368, 385 P.2d 234, 237 (1963). In *Safeway Stores*, we determined the manager of a grocery store was a managing agent upon whom service was proper, noting the manager was "authorized to hire and fire employees and generally to conduct the operations of the [store]" and "exercised considerable discretion for the corporate defendant." *Id.* at 118-19, 400 P.2d at 126-27. Similarly, Aussie was the general manager of the hotel at which Gardner was injured. She was authorized to evict guests and hire and fire hourly employees with the approval of the corporate office, and "overs[aw] the general operation of the hotel."

¶11 Studio 6 asserts, however, that Aussie had less responsibility than the manager in *Safeway Stores*, and, therefore, was not a managing agent. It notes that Aussie could not "contract on behalf of Studio 6," and that her ability to "hire and fire hourly personnel [was]

limited" because she had to obtain approval from the human resources department. *Safeway Stores*, however, did not establish any specific level of responsibility an employee must have before he or she may be found to be a managing agent. Instead, the threshold question remains whether it is reasonably certain the corporate defendant will receive actual notice of the lawsuit. *See Schering Corp.,* 94 Ariz. at 368, 385 P.2d at 237; *Safeway Stores*, 1 Ariz. App. at 119, 400 P.2d at 127.

¶12 Indeed, several other cases addressing this issue have determined service of process was sufficient when the employee had less expansive authority than did Aussie. In *Arizona Mutual Auto Insurance Co. v. Bisbee Auto Co.*, 22 Ariz. 376, 380-81, 197 P. 980, 982 (1921), our supreme court found service upon a corporate entity sufficient when the employee served was an insurance agent whose duties were apparently only to sell insurance and collect premiums. In *Schering Corp.*, a sales representative was found to be a managing agent of a pharmaceutical manufacturing company for the purpose of service of process. 94 Ariz. at 368-69, 385 P.2d at 237. The representative "handle[d] all normal sales functions in his territory," but would consult with his out-of-state manager "when any situation ar[ose] which [was] not provided for in the sales manual." *Id*. at 368, 385 P.2d at 237. He made initial investigations of "reported Fair Trade violations" and was expected to "exercise discretion and judgment" in doing so, but "handle[d] no money" and "d[id] not recommend acceptance or rejection" of credit applications. *Id*. at 369, 385 P.2d at 237. In determining that it was "reasonably certain that the defendant would receive actual notice of the service

made," the court noted the sales representative "was in communication with the [out-of-state] division sales office daily." *Id.* In *Savarese v. Edrick Transfer & Storage, Inc.*, 513 F.2d 140, 144 (9th Cir. 1975), the Ninth Circuit Court of Appeals determined that service on a corporate entity's dispatcher was sufficient under Arizona's rules because that employee's "job largely entails receiving and sending communications." Thus, the court reasoned: "[W]e think that it was reasonably certain that [the employee] would forward any legal papers to the proper official of [the corporation]." *Id.*

¶13 Here, Aussie told the process server she was the manager of the hotel. She also testified she communicated daily with her supervisor in Studio 6's corporate offices. Thus, it would appear reasonably certain she would inform her supervisor in those offices that she had been served with process. Indeed, although the record does not reflect that Aussie informed her supervisor of the application for entry of default, she did inform a claims supervisor at Studio 6's corporate offices. *See Savarese*, 513 F.2d at 144 (fact that employee notified corporation of service of process "lends support" to conclusion service on corporate defendant sufficient).

¶14 Studio 6 nonetheless maintains "the mere fact that a manager of a particular motel unit is designated 'manager' does not place that person in the position of a 'managing or general agent' for service of process." It relies on *Carroll v. Wisconsin Power & Light Co.*, 79 N.W.2d 1, 3 (Wis. 1956), in which the Wisconsin Supreme Court determined that service on the manager of a power generating station was not effective service of process on

the corporate defendant because he had no "general supervision of the affairs of the corporation." The court noted, "[t]here is a distinction between an agent having charge of or conducting some business for a corporation, and a managing agent." *Id.*

¶15 Our supreme court, however, rejected such a definition of "managing agent" in *Schering Corp.*, stating that the rule governing service of process on corporations "was intended to allow a greater range of service on foreign corporations than would be permitted by" a definition of managing agent restricted only to those who have "general powers to exercise judgment and discretion in corporate matters." 94 Ariz. at 368, 385 P.2d at 237. In Arizona, an agent is a "managing agent" if service of process on that agent is reasonably certain to result in the corporate entity having actual notice of such service. *See id.; Safeway Stores*, 1 Ariz. App. at 119, 400 P.2d at 127. Thus, *Carroll* is inapposite. And, although we agree with Studio 6 that an employee is not a managing agent merely because the employee has the term "manager" in his or her job title, Aussie nevertheless meets Arizona's definition of a managing agent for the purpose of service of process.

¶16 Finally, Studio 6 argues service upon it was not proper because Aussie had informed the process server she was not authorized to accept service of process. Its argument on this point, however, focuses not on whether Aussie was a managing agent of Studio 6 but instead on whether she was an apparent agent, which, as we noted above, is not relevant here.

Nor does her statement make it less likely she would inform Studio 6 of the service of process.[4] And, again, Studio 6, in fact, received actual notice of the process served.

¶17 For the reasons stated above, we conclude Studio 6 was effectively served with process through Aussie, and the trial court, therefore, had personal jurisdiction over the corporation. Accordingly, the trial court did not abuse its discretion in denying Studio 6's motion to set aside the default judgment pursuant to Rule 60(c)(4).

Excusable Neglect and Good Cause

¶18 Studio 6 also sought to have the default judgment set aside pursuant to Rule 60(c)(1), Ariz. R. Civ. P., arguing its failure to respond to the complaint was the result of surprise and excusable neglect. It also argued that "[g]ood [c]ause, pursuant to Rule 55(c), [Ariz. R. Civ. P.,] and equitable principles, warrant[ed] vacating the Default Judgment in this case."[5] The trial court denied the motion, finding Studio 6 had not demonstrated excusable neglect because, rather than "act[ing] immediately to prevent the default from becoming

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[4]Indeed, we see no reason to adopt a rule that would permit a managing agent to frustrate service of process on a corporate entity merely by asserting he or she was not authorized to accept such service.

[5]As it did in the trial court, Studio 6 relies on Rule 55(c) as a basis to set aside the default judgment. Rule 55(c), however, governs motions to set aside the entry of default, not a subsequent judgment. Rule 55(c) states that Rule 60(c) governs the setting aside of default judgments. Studio 6 did not move to set aside the default prior to the entry of judgment. In any event, Studio 6 must make the same showing under Rule 55(c) or Rule 60(c): "(1) that [its] failure to answer was excused by one of the grounds set forth in Rule 60(c); (2) that [it] acted promptly in seeking relief from the entry of default; and (3) that [it] had a meritorious defense." *Webb v. Erickson*, 134 Ariz. 182, 185-86, 655 P.2d 6, 9-10 (1982).

effective," Studio 6 instead "call[ed] [Gardner's] attorney's office . . . to inquire as to whether [Gardner] had been a guest at the hotel."

¶19 "[A] motion to set aside a default judgment may be granted only when the moving party has demonstrated each of the following: that its failure to file a timely answer was excusable under one of the subdivisions of rule 60(c); that it acted promptly in seeking relief from the default judgment; and that it had a substantial and meritorious defense to the action." *Daou v. Harris*, 139 Ariz. 353, 358-59, 678 P.2d 934, 939-40 (1984). We review a trial court's denial of relief sought pursuant to Rule 55(c) for an abuse of discretion. *Id.* at 359, 678 P.2d at 940. "Additionally, '[i]f a court's decision is based upon a determination of disputed questions of fact or credibility, a balancing of competing interests, pursuit of recognized judicial policy, or any other basis to which we should give deference, we will not second-guess or substitute our judgment for that of the trial court.'" *Hilgeman v. Am. Mortgage Secs., Inc.*, 196 Ariz. 215, ¶ 7, 994 P.2d 1030, 1033 (App. 2000), *quoting Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 188, 836 P.2d 398, 401 (App. 1992) (internal quotations omitted; alteration in *Hilgeman*).

¶20 Studio 6 asserts on appeal that the "totality of the circumstances in this case do not support sustaining the default judgment." None of the circumstances Studio 6 describes, however, whether viewed separately or collectively, required the trial court to set aside the default judgment.

¶21 In an affidavit attached to Studio 6's motion to set aside the default judgment, Studio 6 employee Claudette Carroll asserted that on June 6, 2007, Aussie had sent her the application for entry of default she had received from Gardner. On June 12, Carroll contacted Gardner's attorney "and requested proof that [Gardner] was a registered guest or, if not, the name of the registered guest." Carroll also claimed Gardner's attorney "stated that he would speak with his client and call [her] back" but did not do so. An employee of Gardner's attorney testified she, not Gardner's attorney, had spoken with Carroll and had told her Gardner's attorney would fax her the requested information. The employee admitted, however, that neither she nor Gardner's attorney called Studio 6 or faxed it any information. The trial court found Carroll had been "mistaken about who she talked to" but noted that it was "undisputed that the attorney did not call Carroll back prior to taking the default judgment."

¶22 Studio 6 asserts on appeal that its employee was attempting to investigate the case "to evaluate whether [it] c[ould] be settled economically without engaging the services of an attorney," and that its employee "did not believe that any further action was required until she received [the requested information]." It suggests that this conduct favors setting aside the judgment, apparently arguing, as it did in the trial court, that its failure to respond in any other fashion to the application for entry of default constituted excusable neglect.

¶23 The trial court correctly rejected this argument. "[T]he test of what is excusable is whether the neglect or inadvertence is such as might be the act of a reasonably

prudent person under similar circumstances." *Daou*, 139 Ariz. at 359, 678 P.2d at 940. The application for entry of default stated that the default "w[ould] be effective against [Studio 6] 10 days after the filing of this application unless said parties plead or otherwise defend prior to the expiration of said 10 days." This clear warning should have prompted Carroll to forward the application to Studio 6's legal counsel or to her supervisor. Had she promptly done so upon receiving the notice of default, Studio 6 could have filed a response to Gardner's complaint before the June 18 default judgment hearing. Studio 6 points to no evidence suggesting Carroll was not aware she should have contacted Studio 6's legal counsel or informed her superior of the default application. Indeed, she testified she was a claims representative who had worked on "general liability and workman's compensation claims," strongly suggesting she would be familiar with legal documents such as the application for default.

¶24 As additional factors favoring setting aside the judgment, Studio 6 asserts it was not attempting to avoid process, it had "specifically advised [Gardner] that Ms. Tammie Aussie did not have authority to accept service," and that "[Studio 6] has a designated statutory agent in Arizona" upon which process was to be served. As we have concluded above, however, Studio 6 was effectively served with process. Moreover, nothing in the rules of procedure requires a plaintiff to serve a defendant's statutory agent if service is otherwise proper. *See Hilgeman*, 196 Ariz. 215, ¶ 12, 994 P.2d at 1034.

¶25 As a final argument, Studio 6 contends the $350,000 judgment was based solely on medical bills and "unsubstantiated statements about future wage loss and impairment," and that it should have been permitted "to contest the nature and extent of [Gardner's] injuries and damages." Although, based on the record before us, the $350,000 award seems generous,[6] that factor alone does not justify setting aside the judgment. In *Roll v. Janca*, 22 Ariz. App. 335, 338, 527 P.2d 294, 297 (1974), Division One of this court upheld a trial court's order setting aside a default judgment, noting that the "large judgment of $25,000 . . . [i]n a trip and fall case where the injury sustained was allegedly merely a twisted knee and torn ligaments" was a factor in favor of setting aside the default judgment. Moreover, the court stated that there was "[u]ncertainty . . . as to whether [the defendants had] received service of process." *Id*. at 337, 527 P.2d at 296. No such uncertainty exists here. As we have explained, Studio 6 was properly served and its failure to act prior to the entry of default or entry of judgment was not the result of excusable neglect. Had Studio 6 acted properly in responding to the notice it had received of Gardner's complaint and

[6]As it did for the evidentiary hearing on its motion to set aside the judgment, Studio 6 also failed to provide this court with a certified transcript of the default judgment hearing as required by Rule 11(b), Ariz. R. Civ. App. P. It attached to its opening brief what is purportedly a transcript of the proceedings, but, again, this method of creating the record on appeal does not comply with our rules. *See In re Prop. at 6757 S. Burcham Ave.*, 204 Ariz. 401, ¶ 11, 64 P.3d at 846-47. Because Gardner attached the same transcript to his answering brief, we will assume that transcript is accurate. It shows that Gardner requested damages of $14,000 for medical expenses and $39,500 for lost income. The exhibits included in the record on appeal support these amounts, but the remainder of the $350,000 judgment is apparently unsupported by documentary evidence or testimony.

application for entry of default, it would have had the opportunity to contest Gardner's damages. *Cf. Hilgeman*, 196 Ariz. 215, ¶ 21, 994 P.2d at 1036 ("Although excusable neglect is not a prerequisite for obtaining relief from a judgment under Rule 60(c)(6), a court may consider that factor in determining whether to grant such relief under that rule."). Accordingly, the trial court did not abuse its discretion in denying Studio 6's motion to set aside the default judgment on those grounds.

Disposition

¶26 We affirm the default judgment against Studio 6 in favor of Gardner.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge